TOWARDS AN INDEPENDENT LAND CLAIMS TRIBUNAL: BILL C-6 IN CONTEXT

By Leigh Ogston Milroy[1]

This paper summarizes some of the main themes emerging from a study of the considerable effort that has been expended in the ongoing debate about what a Canadian independent claims body should look like. At its core, the debate is about whether an independent body should be empowered to deal with a broad spectrum of disputes between Indigenous peoples and the Federal Crown, or whether it is to be a more limited dispute resolution mechanism for a very narrow range of grievances. The debate, then, is really about the degree of independence, and therefore power, that should be accorded to the ICB.

The creation of an "independent claims body" (ICB) has been under serious consideration in Canada for nearly 60 years. Bill C-6, the *Specific Claims Resolution Act*[2] represents the most recent of many attempts to establish a national, specialized dispute resolution mechanism for dealing with Aboriginal land claims. The ICB concept has been endorsed by First Nations' organizations, parliamentary committees, political parties, the Canadian Bar Association, the Canadian Human Rights Commission, and the legal and academic communities. Countless models outlining the form and function that such an institution should take have been proposed from many quarters, and over half a dozen draft bills have been introduced during the last 40 years. In fact, the ICB initiative may well be the oldest unfulfilled election promise on the books – the 1963 general election that brought the Pearson Liberals, and a rookie MP named Jean

---

[1] This document summarizes some of the themes that emerged in the author's MA thesis. For a more detailed chronology of legislative initiatives, policy evolution, models proposed and recommendations made, please see chapters 1-12 of Leigh Ogston Milroy, "Aboriginal Policy-Making and Dispute Resolution Processes: A History of the Concept of a Tribunal for the Adjudication of Specific Land Claims in Canada," MA thesis (Dispute Resolution), University of Victoria, 2002. The author has experience with both comprehensive and specific land claims processes, and has worked in a research/policy analysis and development capacity for First Nations organizations. She was also involved, in a technical capacity on behalf of First Nations, in the last joint effort to devise an independent claims body, the Joint Crown/First Nations Task Force collaborative policy and claims resolution model-building exercise through 1997-1998.

[2] *An Act to establish the Canadian Centre for the Independent Resolution of First Nations Specific Claims to provide for the filing, negotiation and resolution of specific claims and to make related amendments to other Acts*. Second Session, Thirty-Seventh Parliament, 51 Elizabeth II, 2002.

Chretien, to power was won on a platform that included a pledge for an independent "Indian Claims Commission."[3]

The concept of a dedicated commission or specialized tribunal for dealing with unresolved land-related Aboriginal grievances in Canada has been under exploration since a US Indian Claims Commission[4] was established shortly after World War II and a Special Joint Committee of the Senate and the House of Commons made a recommendation in 1947 that a similar body be established in this country. Two Indian Claims Commissions were established in Canada in the latter part of the twentieth century, but both were judged to be ineffective due to their limited jurisdiction and powers.[5]

The 1996 *Report of the Royal Commission on Aboriginal Peoples*[6] identified the need for fundamental change in the Crown-First Nations relationship and called for its renewal. The Federal Government's 1998 response, *Gathering Strength – Canada's Aboriginal Action Plan*,[7] pledged to work in partnership with First Nations to develop solutions for the future. The Statement of Reconciliation delivered as part of the announcement for *Gathering Strength* also promised that "In renewing our partnership, we must ensure that the mistakes which marked our past relationship are not repeated."[8]

---

[3] The Pearson Liberals promised an independent and unbiased commission with international membership. That government drafted two bills in the early 1960's establishing an Indian Claims Commission that would make final and binding determinations on the validity of claims and be empowered to make monetary awards without limit. The proposed commission would deal with the full range of known and anticipated claims – including Aboriginal title claims, non-fulfillment of treaty provisions and "moral" claims turning on the honour of the Crown.

[4] The US Indian Claims Commission operated from 1946 to 1978.

[5] Neither were conceived of, intended as or empowered to be national claims resolution mechanisms. The "Barber" Indian Claims Commission operated from 1969 to 1977 and was advisory in nature. The Indian Specific Claims Commission, which has been in operation since 1993, was intended only as a temporary, transitional body pending significant policy reform anticipated as one of the consequences of the Oka Crisis of 1990. It is also advisory in nature, and mandated primarily to deal with rejected specific claims. A third commission, the Canadian Indian Rights Commission (CIRC), operated briefly from 1977-1978 and undertook inventories of claims in some parts of the country before it was dissolved.

[6] Canada. Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples*. 5 Vols. (Ottawa: Minister of Supply and Services Canada, 1996).

[7] Canada. Indian and Northern Affairs Canada. *Gathering Strength – Canada's Aboriginal Action Plan*. (Ottawa: Indian and Northern Affairs, 1998) 4. Available at: <http://www.ainc-inac.gc.ca/gs/chg_e.html

[8] *Gathering Strength*, 4.

CONSENSUS ON THE NEED FOR AN INDEPENDENT CLAIMS BODY

The problems with the existing specific claims policy and process are well-documented elsewhere, most comprehensively by the national Aboriginal organization, the Assembly of First Nations (AFN).[9] Likewise, potential problem areas with the proposed legislation are catalogued in the AFN's recent legal analysis of the bill.[10]

A considerable amount of thought and energy has been applied to the ICB concept over the last six decades, and has apparently and quite remarkably led to a unanimous consensus: because specific claims are against the Crown, there is a need for some kind of body separate from government to deal with them. Further, whatever form or forms this body takes, it must be as independent as possible – even if, as this apparently implies, the result will be a novel, unique and untested institution in the Canadian or international context. Likewise, a clear consensus has emerged that, in order for this body to be independent, effective and enjoy legitimacy among the people for whom it is being devised, First Nations must be jointly involved in its design and decisions about its composition. Aboriginal groups have demonstrated a consistent interest in resolving specific claims through mediation, assisted informal negotiation and other forms of alternative dispute resolution (ADR), which correspond more closely to Aboriginal peacemaking traditions than do formal adversarial processes such as courts or tribunals.

While ADR is clearly the preferred route to resolution, there appears to be universal acknowledgment that some kind of adjudication option must be retained to serve as an incentive for negotiations and, if necessary, as a last resort when the parties are unable to reach a settlement through other means. Both First Nations and the Federal Government have repeatedly expressed the desire to resolve the majority of outstanding specific claims through negotiation rather than adjudication; as a result, the most recent claims resolution models developed in the late twentieth and early twenty-first centuries have been "hybrid" models involving both facilitative commission and adjudicative tribunal components.

Whatever form any new model takes, it inevitably will inherent a significant backlog of claims. As of June 30, 2002 specific claims submitted to the Federal Government totalled 1,154 with only 233 settlements achieved. According to a recent paper by the Indian Specific Claims Commission (ISCC), currently:

---

[9] See AFN, *First Nations Submission on Claims*, December 14, 1990 (Ottawa: AFN, 1990). See also *AFN's Critique of Land Claims Policies*, August 21, 1990 (Ottawa: AFN, 1990). Available at: >http://www.ubcic.bc.ca/afn.htm.

[10] See *AFN, Legal Analysis of Bill C-60* prepared by Dr. Bryan Schwartz (Ottawa: AFN, 2002). Available at: >http://www.ubcic.bc.ca/docs/AFN_Schwartz-LegalAnalysis_091002.doc

> It takes the Government of Canada five (5) to eight (8) years to complete its validation process. In addition, it takes another five (5) to seven (7) years to negotiate the resolution of a claim. Thus, in total, a First Nation claimant can expect its specific claim to take at least ten (10) to fifteen (15) years in the government process, prior to resolution. Clearly the body of existing claims is being resolved at a snail's pace.[11]

The nearly 30-year-old federal specific claims policy has been neither effective nor successful by any standard measure of program evaluation – including percentage of settled claims, transaction costs and participant satisfaction.[12] Specific claims have historically been a low priority in a low profile portfolio, occasionally making headlines only when a historic grievance like Oka or Ipperwash erupts in the media. These two examples illustrate that unresolved claims don't fade away quietly. It is far less painful and expensive to deal with such grievances when they arise, rather than complicating the possibility of settlement by the aggravation and cost of delay.[13]

CONSENSUS ON THE NEED FOR BROAD JURISDICTION

Ever since the concept of an independent claims body has been considered, First Nations and other commentators have recommended that its terms of reference be as expansive and inclusive as possible. The Department of Indian Affairs, if not the Federal Government at large, has had a clear grasp of the categories of historic Aboriginal grievances since at least the early 1950's[14] and an inkling of the volume of

---

[11] Kathleen Lickers, "A Decade of Experience," (paper prepared for the Indigenous Bar Association conference on Specialized Tribunals and First Nations Legal Institutions, Saskatoon, May 29-31 2002), 9.

[12] Although there has only been one study of satisfaction with specific claims settlements (the unpublished 1994 study by Coopers and Lybrand entitled *Report on the Evaluation of the Specific Claims Negotiation and Settlement Process*), in which only two of 17 communities studied were satisfied with their settlements, it has also been argued that the structure of the current specific claims process is tantamount to coercion. See Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, Vol. 2 (Ottawa: Minister of Supply and Services Canada), 547.

[13] Two men lost their lives in these two separate confrontations. The financial costs of the Oka standoff alone (not including the costs of any settlements with the people of Kanesatake) were estimated to be in excess of $200 million. See Olive Patricia Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Don Mills: Oxford University Press, 2002), 329.

[14] Historic departmental file material reviewed for this study suggests general support within DIAND, the federal government ministry most involved with Aboriginal people, for resolving outstanding historic grievances. Resistance and impediments to the creation of an independent claims body have originated with the Department of Justice and central agencies.

such specific claims since the 1970's. Many of the proposals that have been advanced, including legislative ones, have envisaged an institution that could entertain all manner of potential grievances, including Aboriginal title, Aboriginal and treaty rights and "moral" claims based on fiduciary obligation and the honour of the Crown – more than the sum of current comprehensive, specific and "claims of another kind" policies together. Over time, however, the tendency within government, particularly in the Department of Justice (DOJ) and central agencies, appears to have been to constrict the focus to minimal legal obligations,[15] with the result that land claim processes have been more exclusionary than inclusive:

> The federal government's policy to land claims can clearly be seen as a carefully constructed approach to appease the public, while minimizing the financial burden of potential land claims to the taxpayer. Under current policy, claims can routinely take fifteen to twenty years to settle. The reality of the past thirty years seems to point to an incremental and highly strategic approach by the federal government to consciously delay individual claims, and limit the number of claims heard at any one time, so as to decrease federal costs.[16]

Even keeping to the narrowest possible legal interpretation based on lawful and fiduciary duties, specific claims are justiciable and represent significant contingent liabilities on the Federal Crown. These realities were recognized more than half a century ago when the two joint parliamentary committees recommended the establishment of a special body for dealing with First Nations' historic grievances, and have been reinforced by countless more calls over the ensuing decades for an independent institution dedicated to addressing these types of issues in an expeditious, just, equitable and final manner. Should an independent claims body prove to be a credible and effective vehicle for the delivery of justice, the potential for dealing with more than just lands-related grievances has been recognized.

---

[15] "Despite the federal government's commitment to negotiation, the practice has been "to do no more than meet the minimum requirements of government's interpretations of its obligations under the law." See Katherine Graham and others, *Public Policy and Aboriginal Peoples 1965-1992*, Vol. 1, 125. See also *RCAP Report*, Vol. 2, 545; and Indian Commission of Ontario, "Discussion Paper regarding First Nation Land Claims, September 24, 1990" in *Indian Claims Commission Proceedings: Special Issue on Land Claims Reform* (Ottawa: Minister of Supply and Services, 1995), 171.

[16] Wayne Warry, *Unfinished Dreams: Community Healing and the Reality of Aboriginal Self Government* (Toronto: University of Toronto, 2000), 44.

LACK OF MEANINGFUL CONSULTATION

Canada's First Nations have undertaken a significant amount of technical work on the question of what an independent claims body should look like. This attests to the great importance and high priority this concept enjoys. It is clear from the documentary record that they have closely followed and studied developments – and successes and failures – in other jurisdictions. They have borne these experiences in mind, as well as their own domestic experience to date, in the models and policy recommendations they have developed. Over the years, Aboriginal organizations have generated a rich and extensive body of literature on this question which has, for the most part, been overlooked. Aboriginal views are comprehensively summarized in the 1990 Assembly of First Nations (AFN) document *First Nations Submission on Claims* and, to a lesser but still considerable extent, in the negotiated compromise which culminated in the 1998 *Joint First Nations-Crown Task Force Report*.[17]

As the historical record shows, whether unsolicited or derived from some form of consultation process, Aboriginal views on the matter have been repeatedly disregarded.[18] Their suggestions for resolving claims have yet to be attempted; none of the failed measures taken to date by the Federal Government come close to the types of solutions First Nations have proposed.[19] In addition to their other limitations, federal resolution strategies up to now have focused exclusively on the legal and material

---

[17] The Joint First Nations-Crown Task Force on Specific Claims Policy Reform was the most recent and ambitious effort in collaborative Aboriginal land claims policy development. Over the course of 1997 and 1998, federal and First Nations representatives jointly devised and drafted legislation for a model independent claims body (consisting of a facilitative commission and an adjudicative tribunal with the ability to make binding decisions and unlimited awards). First Nations endorsed this model in an AFN resolution passed by consensus in December, 1998. See the *Report of the Joint First Nations-Canada Task Force on Specific Claims Policy Reform*, available at:>http://www.afn.ca/Programs/Treaties%20and%20Lands%20Unit/Doc/JTF%20Report-November%201998.pdf and AFN Resolution 64/98, *Joint Task Force Report Recommending an Independent Specific Claims Commission and Tribunal* (Ottawa, December 8, 1998).

[18] Nonetheless, Weaver has noted that "when the government ignores such advice, the ideas do not necessarily disappear. Some "hover" over the policy field, thereby continuing to provide alternatives to the conventional policy approach used within government." See Sally Weaver, "A New Paradigm in Canadian Indian Policy for the 1990s," *Canadian Ethnic Studies*, XXII, 3 (1990): 9-10.

[19] One of the most significant criticisms levelled against the US Indian Claims Commission is best summed up by its greatest chronicler, H.D. Rosenthal. "To have been a success the Commission would have had to involve the Indians directly in its formulation and operation." See H.D. Rosenthal, *Their Day in Court: A History of the Indian Claims Commission* (New York & London: Garland Publishing Inc., 1990), 246 (hereafter *Their Day in Court*).

aspects of the conflicts embodied by specific claims, and not on the relational, historical or symbolic dimensions – all of which hold great importance for Aboriginal people. In focusing on only a part of the problem, First Nations have contended that government-initiated efforts to address specific claims have been doomed to fail.

Independent observers, who have overwhelmingly tended to side with Aboriginal critiques and prescriptions,[20] have identified the conflict of interest created by the Federal Government's conflicting roles (trustee for Indians and Indian assets, defendant in claims actions, funder of claims research and adjudicator of claims validity and value) as the central problem with specific claims resolution initiatives attempted to date. There is a consensus view that the specific claims policy and process are inherently flawed. And, minor refinements aside, they remain largely unrevised since their inception in 1973, despite significant developments in Aboriginal case law and three decades of unabated, mounting criticism.

THE BIGGER CONTEXT – RESTITUTION & RECONCILIATION

The growing international movement for the redress of historical injustices is highly relevant and by no means unconnected to the still unresolved dilemma about the best way to deal with specific land claims and other historic Aboriginal grievances in Canada. It is concerned with the challenge of pragmatically redressing longstanding grievances in situations where history cannot be undone, restoration is unfeasible and only partial justice attainable at best. There is increasing pressure, as evidenced by the global reparations movement, for a broader conception of "restitution" involving a much wider range of initiatives than mere monetary compensation.[21] According to Elazar Barkan, restitution amends gross historical injustices by replacing a "universal comprehensive standard of justice with a negotiated justice among the opposing parties

[20] "Many groups, including federal commissions and task forces, increasingly advocated the basic positions of aboriginal peoples. There was continued support, for instance, for the establishment of an independent tribunal to ensure the fairness of the claims process. Continued government rejection of these proposals closed avenues for action and dialogue," see Graham and others, Vol. 1, 102. And, further, "most of the documents prepared by the independent actors express views that are more similar to the aboriginal perspective on process, policy, and perhaps even assumptions than they are to the federal government's views. This observation raises the question of whose views the federal government's policies represent." ibid., 128.

[21] Barkan uses the term restitution to describe "the entire spectrum of attempts to rectify historical injustices," including restoration, reparations, commemoration and apology." See Elazar Barkan, *Guilt of Nations: Restitution and Negotiating Historical Injustices*, (New York: W.W. Norton and Company, Inc., 2000), xix.

in specific cases."[22] In the hybrid claims resolution model that has evolved in Canada, it is with the facilitative commission, rather than the adjudicative tribunal, where the greatest potential for restitution resides.[23]

> In a world that privileges economic transactions, the moral economy of restitution is a viable option for conflict resolution, even if its ramifications on the identities of the protagonists may leave aspects of historical injustices unaddressed. The discourse of restitution aims at the morally possible, not at the politically utopian.[24]

Barkan has further noted that, "as a macroeconomic policy, restitution may have a limited impact on the state and the rich, its major impact on the poor and the victim is political and potentially significant."[25] After a considerable expenditure of effort and numerous false starts, Canada now finds itself at a crossroads. The challenge is to devise a restitution option "somehow proportional to the crimes and injustices to be atoned while leaving the political and economic status of the mainstream fundamentally intact."[26] The pitfall to be avoided is the use of restitution as "an inexpensive way for powerful nations and governments to regain the appearance of just societies while maintaining their position of hegemony and control."[27]

---

[22] ibid., 309.

[23] ibid., 317.

[24] ibid., 349.

[25] ibid., 344.

[26] ibid., 328.

[27] ibid., 342-3. Barkan further elaborates "Is restitution devised so that the rich and powerful who have perpetrated crimes in the past can establish their moral virtue by using resources to "buy" a just and ethical past, while victims are seduced to sell their moral virtue by accepting small recompense as a means to improve their lot. We must be attentive to the concern that restitution may be merely an inconsequential bribe by the rich to their victims to keep them in check and that equality and democratic ideals serve merely as lip service for a hegemonic ideology that facilitates further exploitation of resources around the globe." The US Indian Claims Commission experience is instructive. Francis Moul has noted that, at the end of the day, the 31-year claims process cost more than the total amount of awards made, and further, that "when all the awards were totalled up, from all the claims processed by the ICC, it is about half the cost of a year's appropriation to the Bureau of Indian Affairs…" See Francis Moul, "William McKinley Holt and the Indian Claims Commission," *Great Plains Quarterly* Vol. 16 (Summer 1996): 171, 179.

REFLECTIONS ON HOW WE GOT TO HERE

The debate over the form and magnitude of an ICB has unfolded over a sufficiently long period of time that some lessons have become unlearned and some institutional knowledge within both principle parties has been lost. Casting a look back, it can be seen that certain aspects of the creation of a conflict resolution mechanism for specific land claims – such as jurisdiction, structure, powers and cost – have been more contentious during some periods, and less so at other times, largely as a function of the political climate and priorities. The desire – and pressure – for an effective, made-in-Canada institution and process has clearly increased over the years. Both the Federal Government and, particularly, First Nations have carefully considered and rejected the wholesale adoption of mechanisms developed in other jurisdictions. Although the concept of an ICB has had an extended incubation period, all indications are that if it finally materializes, it will be distinctive to the Canadian context. The hybrid model providing a range of settlement options that has evolved promises to be structurally bicultural, in that the provision for mediation and adjudication arms does represent a fusion of indigenous and Western legal traditions. Over time the principle parties have concurred with the federal legislative drafters of the 1960's and in the new millennium – as well as the Indian Specific Claims Commission – that any new claims resolution bodies must have legislative authority.

Although narrowly focused and restricted to only one specific type of Aboriginal grievance, there is no question that the ICB will be a telling reflection of the broader Crown-First Nation relationship. The crux of the issue was recognized 40 years ago, as residing in the true nature of the proposed body. Is it to be an arbiter of disputes between the Crown and Aboriginal people, or something lesser? First Nations have clearly indicated their preference – a permanent institution to deal with ongoing grievances. The Department of Justice and central agencies have historically resisted that idea and government-initiated proposals have tended to reflect a more limited vision as well as, implicitly or explicitly, a more finite timeline for operation. Ironically, with the considerable passage of time since this concept was first seriously explored within government, international recognition of historical injustices and the need for restitution have only increased.

Whatever type of ICB eventually arises, it will also be a reflection of the role of the national Aboriginal organization, the Assembly of First Nations. When its predecessor, the National Indian Brotherhood, was created out of the ashes of the National Indian Council in the late 1960's, around the time of the Aboriginal rejection of the *1969 White Paper*, it proposed to be the Prime Minister's Office (PMO's) advisor and partner on all matters of Aboriginal policy and program development, particularly in the area of claims resolution and the development of an ICB. The organization has

been challenged in representing a single, unified voice on many issues given its limited resources and extremely diverse and numerous constituency. From the federal perspective, the NIB/AFN has not proven to be one stop body with which the government could negotiate. In the late 1990's, the Federal Government was willing to negotiate specific claims reform only through the avenue of the AFN's Chiefs Committee on Claims, but by the new millennium, the national Aboriginal body was effectively shut out of policy development and process design for the proposed ICB. This says something about the role, capacity and credibility of the AFN, but also has troubling implications for the proposed body's acceptance by First Nations, who have tended to greet unilaterally-developed government initiatives as, in Sally Weaver's words, "empty forums without legitimacy."

NEED FOR SOLUTIONS TO BE JOINTLY CRAFTED

The history of this particular initiative has illustrated that joint policy development is still very experimental and far from perfected. The joint efforts to date have failed for different reasons. The Joint Cabinet/National Indian Brotherhood Committee[28] involved key government decision-makers, which Indian Commissioner Barber and other commentators have considered to be absolutely essential, but which lacked sufficiently broad Aboriginal representation. First Nations did not feel like an equal partner when the Federal Government continued to develop Aboriginal policy outside of the forum. That process dissolved when the parties were unable to agree on the parameters of what they were to negotiate. The two subsequent efforts have suffered from a lack of federal resources and insufficient involvement of central agencies, which could be interpreted both as a reflection of the priority of the issue and the government's political will. On the one hand it is leery of joint processes because it doesn't wish to raise Aboriginal expectations unrealistically, relinquish its authority or Cabinet's ultimate prerogative. On the other hand, history has repeatedly and increasingly demonstrated that First Nations will spurn policies and programs they haven't been involved in shaping. In response to the *RCAP Report* and recommendations, the Federal Government has committed to work more in partnership with First Nations, and is legally if not morally obliged to do so. The "genuinely cooperative approach" that Barber identified over 25 years ago as being essential is still evolving. Clearly further efforts and experimentation are required to achieve this objective.

A closely-related issue is that of consultation. The Indian Claims Commission concept was one of the earliest experiments in wide-scale consultation with Aboriginal people attempted by the Department of Indian and Northern Affairs in the mid-1960's. Great care was taken to record the feedback received, but almost none of it was

[28] The first experiment in collaborative Aboriginal policy development which took place in 1977-8.

incorporated in the government's final product, draft Bill C-123. History repeated itself when First Nations views on claims resolution mechanisms were solicited in the early 1980's and again in the early 1990's. Of all of the legislative initiatives to establish an ICB over the last four decades, the Joint Task Force model of the late 1990's likely involved the widest consultation with First Nations, and that initiative evaporated after First Nations endorsed it through an AFN resolution. Consultation processes to date have been decried as insufficient and inadequate and are a contributing factor to the climate of distrust that has existed for some time. The Crown's duty to consult, long held by First Nations, has been upheld by the courts in decisions like *Sparrow*, *Delgamuukw*, *Halfway River* and *Haida Nation v. British Columbia and Weyerhaueser*,[29] but the obligation to do so meaningfully is still relatively novel and apparently remains yet to be achieved in practice.

In addition to the Crown's duty to consult, a number of other assertions made by First Nations over the last six decades have also been affirmed by the courts, including the legal basis for Aboriginal title and Aboriginal and treaty rights, the existence of a fiduciary obligation and the evidentiary validity of oral testimony. Other assertions, such as the need for the onus of proof to be on the Crown, the illegality of the existing land claims processes in light of federal legal obligations and the impropriety of First Nations bearing the costs of participation in a restitution process[30] may yet be upheld.

FIRST NATIONS' VISION OF AN INDEPENDENT CLAIMS BODY

Despite their diversity, First Nations in Canada have been remarkable consistent in the views they have put forward. They want their Aboriginal title, treaty and Aboriginal rights as well as their indigenous governance structures acknowledged and respected. If restoration isn't possible, their preference is for non-monetary awards and other creative solutions. They want to be in involved in the development of any ICB, which they feel should operate regionally rather than centrally, and they want a say in its composition, to the extent that its members must have knowledge of First Nations' values and be

---

[29] *R. v. Sparrow* (1990) 1 SCR 1075, 70 DLR (4th) 385 SCC; *Delgamuukw v. British Columbia* [1997] 3 SCR 1010; *Halfway River First Nation v. British Columbia* 1999 BCCA 470 and *Haida Nation v. British Columbia and Weyerhaueser*, 2002 BCCA 147.

[30] At the time writing, the First Nations involved in the BC Treaty Process had borrowed nearly $200-million to participate in negotiations. However, the decade-old process, which has cost nearly half a billion dollars to date, has yet to produce a single treaty and it now appears likely that many First Nations will be obliged to start repaying loans before treaties are concluded. In some cases it is feared that the debt-load from participation costs will outstrip final settlement awards. See Vaughn Palmer, "Time Outs' Urged to Help Focus Treaty Talks," *The Vancouver Sun*, September 10 2002. Notwithstanding this experiment, aboriginal people have consistently maintained the principle that the costs of their participation in any restitution process must be borne by the Federal Crown

acceptable to them. They would prefer to arrive at settlements informally through negotiation rather than adjudication, through the use of mediation and other forms of alternative dispute resolution, but they also have insisted on the need for a more formal, independent adjudication option for breaking impasses. Their preference has been for a forum that would address all grievances, including "moral" claims.

The Federal Government, through its actions and unresponsiveness to certain recurring recommendations, has also communicated a certain vision. The need to address longstanding grievances is not disputed, but resolution should not come at too high a cost or jeopardize the status quo.[31] Although technically feasible, the government has declined to use its federal powers to compel greater provincial involvement, to "disturb third parties in the quiet enjoyment of their rights," or to seriously explore the possibility of restoration of land or non-monetary reparations including apology and commemoration.[32]

Government initiatives appear to have been motivated by a fear of both legal and financial precedents which have translated to what has been described as an excessively legalistic and, therefore, highly adversarial approach. This is epitomized in the existing specific land claims policy, which ostensibly "recognizes" the Federal Government's lawful obligations but demands that they first be proved to its satisfaction. That narrow definition ignores issues fundamental to First Nations people and excludes many longstanding and very real grievances. In recent years, government rhetoric around the specific claims process has focused more on partnership, but the unreformed process remains as legalistic and adversarial as ever. Indian Claims Commissioner Lloyd Barber's shuttle diplomacy efforts of the 1970's aside, there has been no real opportunity for direct or wide-ranging dialogue between the parties. And despite the department's legally-focused approach to specific claims, it appears to have downplayed the fact, externally and publicly, that they are legitimate contingent liabilities.

---

[31] The federal government has clearly been aware of the general financial magnitude of unresolved claims since at least the early 1960's, and its concern with controlling settlement costs, and insistence that First Nations bear the costs of participating in any claims resolution process, dates back to at least this time. Dickason has noted the federal government has chosen to adopt very few if any of the recommendations made in major studies such as the Hawthorn, Penner and RCAP reports and has also observed the tendency of "governments to legislate in the interests of the dominant society without consulting Amerindians." See Dickason, 426-7, 238.

[32] Interestingly, at the time of writing there appears to be a greater openness and willingness within DIAND and DOJ to use alternative dispute resolution and explore creative restitution in residential school abuse claims rather than land claims. This may be consistent with the frequent observation that substantive developments in the field of aboriginal policy have tended to be piecemeal and spurred by external pressures – in this case, approximately 10,000 pieces of litigation alleging residential school abuse.

This reluctance to acknowledge the existence of a claim in the first place has proven to be problematic. Common sense dictates that where a perceived sense of grievance exists, there is in fact a real grievance; ruling it ineligible under narrow legal criteria will not make it go away. First Nations, their first formal advocate, Lloyd Barber and others have emphasized the need, first and foremost, for recognition of a grievance as legitimate, regardless of its category or origin, and secondly, that it must be addressed in some way. Elazar Barkan has noted the growing trend to acknowledge and address historical grievances has been paralleled by an increasing public interest in moral and ethical issues.[33] First Nations have consistently made the case that there is a moral as well as legal basis for land claims, and this position appears to be gaining some international support in the context of the global restitution movement.

POLITICAL WILL

One pattern which has been demonstrated in the cyclical, if not repetitive, history of this issue is the influence of leadership and political will. The ICB initiative stayed alive and made progress when the Prime Minister or Minister of the day believed in its utility and supported it. Final outcomes aside, the greatest advances forward occurred under PMs John Diefenbaker, Lester B. Pearson and Jean Chretien and ministers such as Ellen Fairclough, Richard A. Bell, Guy Favreau, Jean Chretien and Jane Stewart. Not surprisingly, the political will of these key politicians also had considerable bearing on the degree of partnership and consultation that occurred with First Nations. On more than one occasion, the minister of the day has personally overseen the deliberate omission of detail from draft legislation, so as to provide the proposed ICB with the maximum possible flexibility to address First Nations historic grievances. As Sally Weaver has also noted, at times there has been a "critical mass" of civil servants with an activist orientation in the Department of Indian and Northern Affairs and the Privy Council Office who have also had great influence on Aboriginal policy and initiatives.

Another factor is the striking degree to which this issue has captured and retained support across all parties. Parliamentary committees have historically been supportive of the goals of Canada's First Nations. The *Debates* of the House of Commons show Members of Parliament to be quite well-informed and sympathetic to the historic grievances of the Aboriginal people in their ridings, a resource that Aboriginal groups have not yet sufficiently tapped into or attempted to mobilize in an organized fashion. Given the length of time their grievances have gone unresolved and that no concrete progress has been made towards the establishment of an effective claims resolution mechanism, their reluctance to resort to or exploit the machinery of government itself is understandable. Nonetheless, elected politicians possibly represent First Nations' most powerful potential ally in ensuring that whatever form a legislated

[33] Barkan, 308.

ICB eventually takes, that it corresponds as closely as possible to First Nations values and aspirations.

Although the concept of an independent body for resolving Aboriginal peoples grievances with the state has been a First Nations priority for more than half a century, the initiative has persistently been overshadowed by other issues, most notably the reform of the *Indian Act*. It does appear that, at a legislative level, there may be a somewhat finite capacity to deal with Aboriginal issues; that is to say that Parliament's time and energy is limited at the best of times, and when multiple legislative proposals focused on Aboriginal people have been on the agenda, one initiative has tended to dominate.[34]

Despite the fact that the concept of an independent claims body has remained unrealized for so long, there have been some positive developments. Specific defects aside, each of the three joint policy-making exercises[35] that have been attempted in the context of claims resolution have been improvements upon what has gone before them. Although fatally flawed, the Barber Commission, the Indian Commission of Ontario[36] and the Indian Specific Claims Commission experiments have demonstrated the promise and potential of mediation and bicultural approaches in the resolution of historic First Nations grievances.

Whether the ICB (when it finally materializes) will represent real innovation over the half-measures that have preceded it remains to be seen. Will the end result enjoy First Nations' confidence by recognizing and addressing their concerns, incorporating their process design suggestions and involving some tangible power-sharing? Or will it merely correspond to "tinkering at the edges," a cosmetic make-over of the status quo? After nearly 60 years of considering how best to address this problem, will the final product be "just another device concocted to whittle away Indian rights" or a key instrument in the redefinition of the Crown-First Nation relationship?

TOWARDS A NEW CLAIMS RESOLUTION MECHANISM

[34] At the present time, Bill C-7, the proposed *First Nations Governance Act* (formerly Bill C-61) is receiving considerably more attention than Bill C-6 (formerly Bill C-60), the most recent draft legislation establishing an independent claims body.

[35] The Joint Cabinet/National Indian Brotherhood Committee and CIRC processes of 1977-78, the post-Oka Joint Working Group process of 1993 and the Joint Crown-First Nations Task Force initiative of 1997-98.

[36] A regional mechanism focusing on mediation which operated from 1978 to 2000.

Commentators such as Sally Weaver have remarked that Aboriginal policy-making has tended to occur on a piecemeal and ad hoc basis.[37] Eric Colvin, whose 1981 ADR-focused proposal for a specific claims resolution process closely approximated the model worked out by the 1998 Joint Task Force, noted at the time that "in its failure to develop a special institution to handle the claims of its indigenous peoples, Canada stands alone among the major states in which English-speaking settlers have become the majority."[38] Bradford Morse, whose 1982 proposal also involved the use of labour dispute resolution mechanisms and paralleled many aspects of the *Joint Task Force Report*, has observed that "the historical evidence graphically displays the difficulty in obtaining a consensus on the resolution of specific and comprehensive claims in the absence of external pressures."[39]

It is the conflict of interest problem that is at the root of calls for a new claims resolution mechanism to be as independent as possible. In order for this independent claims body to have any chance of success, and enjoy the confidence of those for whom it is created, it is widely felt that all traces of the old and any potential for new conflict of interest must be eradicated. For this reason, it would be very problematic to merely "enhance" or "transition" the existing Indian Specific Claims Commission into the proposed new body. Notwithstanding its significant experience and expertise, there is a general consensus that a clean break with the past and a brand new body is required.

On the other hand, some question the point of creating a new independent claims body within an unchanged policy framework. The legislative proposal of 2002 may seem innovative by contrast to previous federal measures, but it is still a very limited and contained experiment. It could be argued that Bill C-6 represents merely an incremental step beyond previous federal initiatives: the independence of the proposed tribunal is limited; the definition of a specific claim corresponds to the most narrow possible legal definition; only material losses will be compensated, and only cash awards are contemplated. First Nations continue to bear the costs of participation, and

---

[37] Sally Weaver, "Federal Difficulties with Aboriginal Rights Demands," (paper read at the conference on aboriginal rights, University of Lethbridge, Alberta, January 18-21, 1983), 2-3.

[38] Eric Colvin, "Legal Process and the Resolution of Indian Claims," *Studies in Aboriginal Rights (University of Saskatchewan Native Law Centre)* 3 (1980): 28.

[39] Bradford W. Morse, "Labour Relations Dispute Resolution Mechanisms and Indian Land Claims." In *Indian Land Claims in Canada*, edited by B.W. Morse (Ottawa: Association of Iroquois and Allied Indians, Grand Council Treaty #3 and Union of Ontario Indians, 1982), 55. Menno Boldt has noted that "Unless confronted with an "Indian crisis," the time of Parliament and of Cabinet is deemed too valuable to take up for a concentrated examination of Indian Interests, rights, needs, and aspirations." See Menno Boldt, "Federal Government Policy and the 'National Interest'," in *Expressions in Canadian Native Studies* edited by Ron F. Laliberte and others (Saskatoon: University of Saskatchewan Extension Press), 272.

in so doing, the costs of process delay.

While Bill C-6 does represent a marked shift away from purely advisory bodies like the Barber Commission and the Indian Specific Claims Commission, it does not appear to embody the structural and institutional independence Aboriginal groups and other observers have deemed essential. First Nations have expressed the concern that the problems of conflict of interest and gross power imbalance are being perpetuated through the Federal Government's unilateral design of the structure and process, control over composition through the appointments process,[40] and power over operations and settlement funding. These considerations centre squarely on the question of institutional or structural independence.

NEED FOR MAXIMUM STRUCTURAL INDEPENDENCE

In his comprehensive *Study of Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations, Final Report*, United Nations special rapporteur Miguel Alfonso Martinez envisioned the possibility of the creation of an adjudicative tribunal for dealing as a last resort with the grievances of Indigenous peoples.[41] Reflecting on the experience of Native Americans with the US Indian Claims Commission, Isabelle Schulte-Tenckhoff has questioned whether it is at all possible that claims "can be dealt with satisfactorily and justly within the doctrinal framework and legal system of one part only, namely the state party."[42] Other commentators, including the Canadian Bar Association, have linked the need for the institutional independence of tribunals to Canada's international legal obligations:

> the case for independence is not simply a matter of good policy. International standards, not to mention Canada's international obligations, are also involved. The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights both proclaim that everyone should be entitled to a

---

[40] The financial security of tribunal members and their security of tenure have long been recognized as factors contributing to institutional independence. First Nations have expressed concern about the length of terms for tribunal members in conjunction with the proposed tribunal's appointment process, as set out in the draft legislation, *Bill C-6*. The Diefenbaker bill provided for permanent appointments, and the two Liberal draft bills of the 1960's, Bills C-130 and C-123, provided for appointments of up to 10 years.

[41] Miguel Alfonso Martinez, *Study of Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations: Final Report*, (New York: Economic and Social Council, United Nations, 1999), at para 308.

[42] Isabelle Schulte-Tenckhoff, "Reassessing the Paradigm of Domestication," *Review of Constitutional Studies*, Vol. IV, No. 2, (1998): 259.

> fair and public hearing by a competent, independent and impartial tribunal established by law.[43]

Furthermore, in recent testimony before the Standing Committee on Aboriginal Affairs, ISCC Co-chair James Prentice stressed that:

> We regard the resolution of specific claims not as a government program, but rather as a justice and human rights issue. We believe that at the end of the day Canadian society will in fact be judged on the way in which these claims are adjudicated in our country."[44]

The literature on administrative tribunals is very clear that, "since a tribunal or agency is a creature of statute, it is what the statute creating it says it is."[45] Parliament determines the degree of institutional independence through the statute.[46] "The question

---

[43] Canadian Bar Association, *Report of the Canadian Bar Association Task Force on the Independence of Federal Administrative Tribunals and Agencies in Canada*, (Ottawa: The Canadian Bar Association, September 1990), 11 (hereafter *Independence of Tribunals Report*). See also Kenneth Lysyk, "Resource Paper on Human Rights and Canada's Native People," address delivered to the Ninth Annual Meeting and Conference of the Indian-Eskimo Association of Canada (Toronto: The Indian-Eskimo Association of Canada, September 1968), 11, 13.

[44] ISCC Co-Chair James Prentice testimony before Standing Committee on Aboriginal Affairs, *Minutes of Evidence and Proceedings*, May 29 2001, 2.

[45] Canadian Bar Association, *Independence of Tribunals Report*, 9. The proposed ICB's enabling legislation is clearly of critical importance. Commentators have remarked of the US Indian Claims Commission that the legislation establishing it was interpreted "far more narrowly than its wording mandated" and also, that "once established, the Commission's structure has been remarkably resistent [sic] to change." See Rosenthal, *Their Day in Court*, 249; Sandra C. Danforth, "Repaying Historical Debts: The Indian Claims Commission," *North Dakota Law Review*, Vol. 49, Issue 2, 375.

[46] "...independence is never absolute. Thus, depending on such factors as the nature of the tribunal, the form of decision-making power and the importance of the dispute to be resolved, independence may be restricted. See Richard Haigh and Jim Smith, "Independence after *Matsqui*?" *Canadian Journal of Administrative Law and Practice* (1997/1998): 102; Lordon, J. Paul, "The Independence of Administrative Tribunals: Checking out the Elephant," *University of New Brunswick Law Journal* Vol. 45 (1996): 137; Attorney General of BC, *Independence and Accountability: Report and Recommendations* (Victoria: Administrative Justice Project for the Attorney General of British Columbia, July 2002):10-11 (hereafter *Independence and Accountability*); *Ocean Port Hotel Ltd. v. British Columbia* (General Manager, Liquor Control and Licensing Branch), 2001 SCC 52 at para 20, 24.

which then must be asked is what is the appropriate degree of independence?"[47] A recent review of administrative tribunals in the United Kingdom concluded:

> …the only way in which users can be satisfied that tribunals are truly independent is by developing clear separation between the ministers and other authorities whose policies and decisions are tested by tribunals, and the minister who appoints and supports them.[48]

A contemporaneous study in a Canadian administrative law journal drew a similar conclusion:

> The need for independence from the executive branch, in particular, is especially compelling at tribunals where a government department is typically a party to the disputes under adjudication.[49]

In the Supreme Court of Canada *Matsqui* decision,[50] Chief Justice Lamer noted that "where a party has a reasonable apprehension of bias, it should not be required to submit to the tribunal giving rise to this apprehension."[51] Based on experience with the Barber Commission, the Office of Native Claims/Specific Claims Branch and the ISCC, there is potential for the proposed claims resolution mechanism to be boycotted or underutilized if its independence is questioned.

Rosalie Silberman Abella and others have noted that the independence and credibility of tribunals are contingent on their being adequately resourced.[52] The study commissioned by the Royal Commission on Aboriginal Peoples which examined

---

[47] Canadian Bar Association, *Independence of Tribunals Report*, 10, 12.

[48] Sir Andrew Leggatt, *Report of the Review of Tribunals by Sir Andrew Leggatt: Tribunals for Users – One System, One Service.* August, 2001, Section 2:23 (hereafter *Leggatt Report*). Available from <http://www.tribunals-review.org.uk; Internet.

[49] Katrina Miriam Wyman, "The Independence of Administrative Tribunals in an Era of Ever Expansive Judicial Independence," *Canadian Journal of Administrative Law & Practice* 14 (2000/2001):121.

[50] *Canadian Pacific Ltd. v. Matsqui Indian Band* [1995] 1 SCR 3 (hereafter *Matsqui*). Haigh and Smith have characterized *Matsqui* as providing "no coherent guidance on dealing with the issue of institutional independence." See Haigh and Smith, 145.

[51] *Matsqui* at para 80, as cited in Lordon, 133.

[52] Rosalie Silberman Abella, "The Independence of Administrative Tribunals," *The Law Society Gazette*, Vol. XXVI (1992):117.

federal claims processes – and recommended the establishment of a legislated, independent tribunal – stressed that "the tribunal's own funding must be as secure and independent of Canadian government policy as is the funding of Canadian courts."[53] The need for sufficient resourcing was recognized as crucial in a Canadian publication issued over three decades ago:

> …the experience of the United States Indian Claims Commission provides a clear warning that understaffing of the Commission can be expected to result in dragging-out its deliberations over a long period of time, and/or to affect the quality of the research, and therefore of the decisions, of the Commission.[54]

The link between independence and impartiality is acknowledged in the literature on the independence of tribunals.[55] Where independence is perceived to be undermined, a tribunal's impartiality can be brought into question:[56]

> …some commentators have suggested that the utility of independent administrative agencies is compromised if governments are able to use budgetary controls, Cabinet appeals, policy directives or mechanisms other than changes to the agency's enabling legislation to influence the agency's decisions.[57]

---

[53] Morris/Rose/Ledgett, *Is Canada's Thumb on the Scales? An Analysis of Canada's Comprehensive and Specific Claims Policies and Suggested Alternatives.* Report prepared for the Royal Commission on Aboriginal Peoples. (Toronto: Morris/Rose/Ledgett, June 30, 1994), 250.

[54] Peter A. Cumming and Neil H. Mickenberg, *Native Rights in Canada*, 2nd ed., (Toronto: Indian-Eskimo Association of Canada/General Publishing Co., 1972), 260.

[55] See *Matsqui* at para 52, quoted Haigh, 138.

[56] Judith McCormack has described this interrelationship as a fundamental assumption underpinning adjudication - "the idea that adjudicators will base their decisions on the evidence and the law before them, and not upon extraneous considerations, including fear, self-interest or prejudice." See Judith McCormack, "The Price of Administrative Justice" (1998) 6 *Canadian Labour and Employment Law Journal* 1 at 16, quoted in Philip Bryden and Ron Hatch, "British Columbia Council of Administrative Tribunals Research and Policy Committee – Report on Independence, Accountability and Appointment Process in British Columbia Tribunals," *Canadian Journal of Administrative Law and Practice* (1998/1999): 12, 238.

[57] Bryden and Hatch, 239.

The connection between institutional credibility and confidence has long been recognized: as Lord Denning[58] succinctly observed, "Justice is rooted in confidence."[59] Murray Rankin has also remarked:

> Without this legitimacy, derived from an earned reputation for independent behaviour, a board that is required by statue to reach its decisions in an impartial manner will no longer be perceived as anything more than a conduit for transmitting the will of the government of the day.[60]

The Canadian Bar Association report on the independence of tribunals has also remarked that:

> There is a suspicion in many quarters that the establishment of a tribunal is a facile way of avoiding dealing with a sensitive subject. When a tribunal is established, but only given the appearance of independence, that suspicion is reinforced."[61]

In addition to being linked to independence of operations, institutional credibility is strongly tied to the composition of a tribunal, and the appointment process employed.[62]

---

[58] Lord Denning is widely regarded to have been the greatest judge of the twentieth century.

[59] As quoted in the *Leggatt Report*, Ch. 2, 1.

[60] Murray Rankin, "Perspectives on the Independence of Administrative Tribunals," *Canadian Journal of Admin Law and Practice* 6 (1992/1993): 92.

[61] Canadian Bar Association, *Independence of Tribunals Report*, 14.

[62] The issue of appointments and membership, which has been identified by the Assembly of First Nations as a serious concern with recent federal legislative proposals, is recognized to have been a significant problem area for the US Indian Claims Commission. Observers of the American experience have remarked that none of the original presidential appointments to the Commission had any particular knowledge or interest in Aboriginal history and culture; that one of the most fundamental problems with the US ICC was that it was susceptible to political manipulation and that, further, "Indian successes often depended on the makeup of the court and shifted as its membership did." See H.D. Rosenthal, "Indian Claims and the American Conscience: A Brief History of the Indian Claims Commission" in *Irredeemable America: The Indians' Estate and Land Claims*, edited by Imre Sutton and others (Albuquerque: Native American Studies, University of New Mexico, 1985), 51; Nancy O. Lurie, "The Indian Claims Commission," *The Annals of the American Academy of Political and Social Science*, Vol. 436, 1978, 107; Michael Lieder and Jake Page, *Wild Justice: The People of Geronimo vs. the United States* (Norman: University of Oklahoma Press, 1997), 265, 271.

The connection between appointments and institutional independence has not yet been fully considered by the still unfolding doctrine on tribunal independence.[63] Many commentators, including the Canadian Bar Association, have no difficulty with the concept of the final decision on appointments lying with the executive,[64] but it has equally been noted that "an open and merit based appointment process helps to ensure public confidence in the competence and quality of decisions rendered by tribunals."[65]

> Whether one accepts tribunals as being an aid to or implementer of public policy, it is crucial that they are seen as credible by the parties who rely on their decisions. And one of the ways they are seen as credible is if their appointments are made in a way which reflects respect for their independence. If the appointments to tribunals are made without sensitivity to the objective qualifications of the appointees, or bear little or no relationship to the needs of the tribunal, both the motives of the appointing body and the decisions of the tribunal become suspect.[66]

In its proposal for an Aboriginal Lands and Treaties Tribunal, the Royal Commission on Aboriginal Peoples stated that "the credibility and legitimacy of the tribunal will depend on its composition and the process for appointing members." It recommended that Aboriginal nominees should be equally represented at all levels of the tribunal; the composition of the tribunal should be representative of the different regions of Canada; that nominations be screened by a committee broadly representative of stakeholders, and that final appointments by government be based on the joint recommendations of the Federal Government and First Nations.[67]

Given the lack of resolution of their historic grievances to date, many Aboriginal people in Canada have come to equate tribunal "independence" with unencumbered binding powers. The concept of a tribunal with binding powers up to some pre-determined financial ceiling has been widely perceived as tantamount to the creation of nothing more than a "small claims court." Early legislative proposals developed in the 1960's in Canada did not attempt to put a limit on tribunal awards, but

---

[63] Wyman, 101.

[64] Canadian Bar Association, *Independence of Tribunals Report*, 52. See also Rankin, 97.

[65] Attorney General of British Columbia, *Independence and Accountability*, 17.

[66] Abella, 115.

[67] *RCAP Report*, Vol. 2, 610-11.

during the late 1990's, as the concept of a hybrid claims resolution structure involving a tribunal was under development, the Federal Government consistently expressed an interest in limiting the tribunal's ability to make binding awards through such a financial cap. In addition to being perceived by Aboriginal groups as discriminatory and exclusionary, it was also seen as undermining justice and contrary to good faith. At a recent legal conference, ISCC Co-chair James Prentice discussed the ramifications of such a cap:

> …if it is intended that an independent claims tribunal replace the Courts as the forum for the final resolution of land claims, then its jurisdiction must include the power to award compensation. This is a subject at which the federal government has balked, on the basis that unlimited awards would cause serious disruptions in budgetary planning. It can be pointed out, however, that the Courts are not subject to any arbitrary limits in the amounts that they may award in litigated claims. Therefore, it appears to make little sense to restrict the jurisdiction of a specialized tribunal in this way, when the Courts, who do not possess any particular expertise, are not similarly limited. As a result, it is in the interest of the federal government to come to terms on this issue if it wishes to establish a credible, final and binding process for the resolution of land claims.[68]

The 1994 study by Morris/Rose/Ledgett which recommended the establishment of a legislated, independent tribunal remarked that "in the end, the acceptability of having a binding tribunal will need to be dealt with by having various terms of reference which enhance the legitimacy and political acceptability of the Tribunal."[69]

The Federal Government's reluctance to create an independent tribunal with powers to make unlimited, binding financial awards appears to be rooted in a larger systemic and institutional imperative to prevent disruption of the status quo through the preservation, to the maximum degree possible, of power and resources.[70] Although the

---

[68] James Prentice, "Reform of the Specific Claims Process," (paper prepared for the continuing legal education conference on Aboriginal Law, Winnipeg, April, 2000), 20.

[69] The RCAP study further noted that "without such terms of reference, the Tribunal would be left without guidance. It would be undesirable to leave the Tribunal on its own in this way. The terms of reference, indeed, will amount to the new substantive claims policy…" See Morris/Rose/Ledgett, *Is Canada's Thumb on the Scales?*, 248.

[70] Montminy has identified political will as one of the most critical aspects of the debate over the form and function of an independent claims body. "The creation of an independent claims body has been discussed for over 40 years but there has never been a true political will to establish such an independent body with a strong mandate and meaningful powers. The reasons for this are obvious from a government's perspective. Why would the federal government abdicate its powers over the process – and

concept of an independent claims body has enjoyed considerable public support, it has met four decades' of resistance from the DOJ and central agencies unwilling to relinquish state jurisdiction and control:

> No matter how much the native parties may ask for and no matter how little governments are willing to concede (and I would even go so far as to say that no matter how extensive the legal arguments that may be made on behalf of the natives) the settlement of native claims will be determined by the political acceptance of their contents. What the government offers and finally negotiates must be acceptable to the public.[71]

However, Lloyd Barber has noted that:

> The history of governmental relationships with the Indian and Inuit people suggests that the issues should not be dealt with as ordinary political problems where the main consideration is characteristically that of balancing the interests and concerns of various groups. In this case, there is a special, historically-based Government responsibility which calls for the highest possible standard of justice. This fact should raise the matter above the consideration of current political and legal factors.[72]

Menno Boldt has expressed the belief that Indian policy in Canada has historically been subverted within a "national interest" paradigm, and noted that despite their other differences:

> all Canadian governments, of whatever party stripe, have consistently subordinated Indian interests to the Canadian "national interest" in their development of policy. None has developed policies with primary or coequal

---

sometimes even the outcomes of the disputes – to give any form of binding authority to an independent claims body…?" See Joëlle Montminy, "The Search for Appropriate Dispute Resolution Mechanisms to resolve Aboriginal Land Claims: Empowerment and Recognition." (LLM Thesis, UBC, 1996), 223.

[71] John Ciaccia, "The Settlement of Native Claims," *Alberta Law Review* Vol. XV (paper presented to the Canadian Petroleum Law Foundation Midwinter Conference, Calgary, Feb. 11, 1977), 561.

[72] Canada, Commission on Indian Claims [Lloyd Barber], *A Report: Commissioner on Indian Claims. Statements and Submissions*, (Ottawa: Minister of Supply and Services, 1977) 50.

> reference to Indian interests, rights, needs, or aspirations."[73]

In the late 1980's and early 1990's, Sally Weaver made the case that the Federal Government's conception of First Nations' issues was in the process of a somewhat turbulent paradigm shift:

> the old paradigm is characterized by a preoccupation with law, formality, and control over First Nations peoples. The new paradigm is more concerned with justice, adaptation and workable inter-cultural relations. And it conceptualizes relations between the state and First Nations as going beyond "lawful obligations" to incorporate the historical and moral obligations in an attempt to put increasingly hostile and unproductive state-aboriginal relations onto a new and useful footing.[74]

More than a decade later, this paradigm shift has yet to be materially demonstrated, although neither has it been disproved. In the 2002 annual Lafontaine-Baldwin lecture Georges Erasmus, former AFN National Chief and Co-Chair of the Royal Commission on Aboriginal Peoples noted that "the costs of conflict, in the courts and society, are unsupportable. The costs of doing nothing escalate with each generation. We have the capacity to imagine a better future and we have the tools at hand to realize it." First Nations have clearly equated the most recent legislative proposal of 2002 with "old paradigm" thinking. It remains to be seen whether the long-awaited independent claims body legislation will, in its final form, represent any sort of transition to "new paradigm" thinking. #

---

[73] Boldt, 278-9.

[74] Weaver, *A New Paradigm*, 12, 15.

November, 2002

All feedback welcome. Comments may be directed to leigh@idmail.com